No. 92-1368

In the Supreme Court of the United States

October Term, 1992

JACQUELINE B. BRUNEAU,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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Petitioner Jacqueline B. Bruneau seeks the return of funds that were received by a bank when it was hopelessly insolvent. Contrary to the repeated assertions by respondent FDIC, ***this petition does not rest on any oral representations*** that were made to petitioner concerning the insurability of her funds. This petition rests solely upon the hopeless insolvency doctrine. The respondent devotes only one paragraph to this doctrine.

In its cursory treatment of the hopeless insolvency doctrine, the federal respondent resorts to the timeless rhetorical fallacy that if it returns Ms. Bruneau's money it must return everyone's money. To lend credibility to this irrelevancy, the respondent baldly alleges that returning Ms. Bruneau's deposit "would make orderly disposition of the assets of a failed institution impracticable." Respondent's Brief at 7.

The respondent neither pleaded nor proved how this would be the case. Moreover, because it is an equitable doctrine, the hopeless insolvency contains a built-in "reasonable-

ness" limitation in cases where application of the doctrine might disrupt orderly administration or otherwise cause inequity.[1] Thus the appropriate judicial response to Ms. Bruneau's claim is to consider on the merits whether application of the doctrine is warranted, not simply to disregard the doctrine because of the possibility of some imagined inequity or disruption in certain cases.

I. Hopeless Insolvency is the Gravamen of the Petition

No authority cited by the respondent has even questioned the continued validity of the hopeless insolvency doctrine. The Restatement, Restitution § 166 comment b (1937), recites this familiar doctrine:

> So also, if a bank by fraudulent representation, as for example by continuing to do business after it is insolvent to the knowledge of its officers, induces a person to make a deposit in the bank, and the bank fails, the depositor is entitled to priority over other creditors of the bank including depositors who were not defrauded, provided that the depositor is able to trace the money which was deposited (see § 215).[2]

While ignoring the considerable authority cited by petitioner, the federal respondent concedes for the first time that

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1. "Even in the case of hopeless insolvency, however, full restitution may be denied when it would sufficiently disrupt the orderly administration of the receiver's estate or otherwise result in inequitable treatment to other similarly situated depositors." *Downriver Community Federal Credit Union v. Penn Square Bank*, 879 F.2d 754, 762 (10th Cir. 1989), cert. denied, 110 S.Ct. 1112 (1990).

2. Professors Warren A. Seavey and Austin W. Scott are the reporters of the Restatement, Restitution (1937). The American Law Institute's Committee on Restitution included Dean Erwin N. Griswold and Professor Samuel Williston.

Downriver Community Federal Credit Union v. Penn Square Bank, 879 F.2d 754 (10th Cir. 1989), cert. denied, 110 S.Ct. 1112 (1990) suggests that a hopeless insolvency claim "might prevail in some instances." Brief of Respondent at 5.

The federal respondent does not say just what those circumstances are. Nor can the federal respondent explain how Ms. Bruneau can plead a prima facie case under the hopeless insolvency doctrine as set forth in *Downriver*, but nevertheless have her claim for a return of her money barred as a matter of law.[3] Instead of squarely meeting petitioner's legal argument, respondent continues to miscast petitioner's claim as one based upon an oral representation or a side agreement.

Once again, this petition has nothing to do with oral representations or upon an off-the-books, side agreement. Rather, it is based upon the known hopeless insolvency of the bank at the time of Ms. Bruneau's deposit, giving rise to a constructive trust. As *Downriver* makes clear those persons who deposit funds in a hopelessly insolvent bank are entitled to reclaim these trust funds. Id. at 762. *Cf.* Footnote 3 of Respondent's Brief, which misstates the interplay of the hopeless insolvency doctrine and *D'Oench, Duhme.*

II. A Constructive Trust is Not a Preference

Contrary to the protestations of the federal respondent, a return of a "constructive trust" deposit is not a preference. When a bank receives a deposit after it is hopelessly insolvent, title to such funds does not vest in the bank; rather, they remain trust funds. Ms. Bruneau's funds were impressed with a trust from the inception of her "deposit" because the bank was hopelessly insolvent. *See* Brief of Petitioner at p. 7-8.

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3. The FDIC did not challenge the factual sufficiency of Bruneau's claim for relief.

III. The Respondent Seeks to Extend D'Oench, Duhme to All Manner of Cases—Even Cases That Do Not Depend on Unrecorded Side Agreements

The respondent seeks to do more than "merely" overturn the hopeless insolvency doctrine, which for over one hundred years has afforded a remedy to innocent depositors; it also seeks to further expand the reach of *D'Oench, Duhme.*

The respondent would thereby not only abolish the hopeless insolvency doctrine, but would also doom the growing body of federal decisions which hold that *D'Oench, Duhme* does not apply to claims sounding in tort, *e.g.*, claims based on state law misrepresentational torts. *See, e.g., Vernon v. FDIC*, 981 F.2d 1230 at nn. 6-8 (11th Cir. 1993), *reh'g denied*, __ F.2d __ (April 7, 1993) (*Vernon II)* (shareholder suit sounding in common law tort and securities law violations not barred by *D'Oench, Duhme*).[4]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted.

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4. Judge Fay observed in *Vernon II* at n. 8: "We acknowledge there are courts that disagree with our limitation of the doctrine and perhaps the Supreme Court or Congress will shed light on the intended scope of the *D'Oench* decision in the near future."